STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHAWN LEE POWELL,

APPELLANT

APPELLATE CASE NO. 2012-212140

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in overruling the hearsay objections made to the testimony of two witnesses about what a third witness said, finding the testimony met the present sense impression exception to the rule against hearsay?

STATEMENT OF THE CASE

In February of 2011, the Orangeburg County Grand Jury indicted Powell for murder, indictment #2011-GS-38-0015. On May 15, 2012, Powell proceeded to jury trial before the Honorable Edgar W. Dickson. Peggy Hinds and Douglas Mellard represented Powell at trial. Donald Sorenson and Harrison Bell prosecuted the case. The jury found Powell guilty of the lesser included offense of voluntary manslaughter. Judge Dickson sentenced Powell the thirty (30) years in prison. A timely notice of intent to appeal was served and filed. This appeal follows.

ARGUMENT

The trial judge erred in overruling the hearsay objections made to the testimony of two witnesses about what a third witness said, finding the testimony met the present sense impression exception to the rule against hearsay.

The jury found Powell guilty of voluntary manslaughter. Niki Bryant, aka Wendy Noel, testified that on November 3, 2010, at approximately 5:00 AM she returned to Arthur Riley's house on Jameson Street. When she knocked on the door, the door partially opened and she saw Riley on the floor and the house in disarray. (Tr. p. 50, line 1 – p. 51, lines 1-12). According to Bryant, she got scared and ran to find someone to call the police. (Tr. p. 51, lines 14-21). Officers with the Orangeburg County Sheriff's Department responded to Jameson Street and met with Bryant who directed them to Riley's home. (Tr. p. 26, line 1-p. 27, lines 1-12). The officers found Riley lying in the doorway in a pool of blood. (Tr. p. 27, lines 15-20). Crime scene investigator Lieutenant Gerald Carter testified that Riley was found face up, unclothed in his living room. (Tr. p. 137, lines 2-8). Upon examining Riley at autopsy, the forensic pathologist, Dr. Janice Ross, testified that she observed both sharp force injuries and blunt force injuries. (Tr. p. 251, lines 20-25). Dr. Ross testified that the cause of death was exsanguination due to stab wounds. (Tr. p. 260, lines 9-16).

Bryant testified that Riley's house was a crack house where people smoked crack, sold crack, drank and tricked. (Tr. p. 41, lines 18-25). Between midnight and 2:00 AM on November 3, 2010, Bryant went to Riley's house to get crack. (Tr. p. 44, line 2 – p. 45, lines 1-18). According to Bryant, when she arrived at Riley's house he asked her to stay but she left with Slick and Ebony to turn a trick. (Tr. p. 45, line 19 – p. 46, 47, lines 1-18). Bryant testified that Red and Todd were at Riley's house when she left. (Tr. p. 44, lines 12-22).

Ronnette "Red" Stevenson testified that on the evening of November 2, 2010, and early morning of November 3, 2010, she was at Art Riley's house "drinking, getting high, playing cards" and chatting with Todd and Monkey Doo. (Tr. p. 93, lines 11-25). Riley later asked them to leave his house because he was expecting company. (Tr. p. 94, lines 3-19). According to Red, she and Todd left Riley's house and saw Darrell Jones, "D-Shop" and Appellant, "New York" walking toward Riley's house. (Tr. p. 95, lines 3 - 24). Red testified that Appellant asked her who was at Art Riley's house and she told him the house was closed down because Riley was expecting company. (Tr. p. 95, line 23 – p. 96, line 1). According to Red, Appellant and D-Shop kept walking toward Riley's house.

Red testified, "As we was walking, I, I turned around and I seen D-Shop and I said D-Shop what's going on, and he was like man, he in there beating, beating Mr.--" (Tr. p. 96, lines 23-25). Appellant objected on hearsay grounds. (Tr. p. 97, lines 3-4). The State argued the testimony met the present sense impression exception to the rule against hearsay. (Tr. p. 97, lines 6-14). The trial judge agreed, stating, "All right. Okay. I'm gonna overrule the objection. I'm gonna let it go in, okay, as present sense impression. I'll note your objection" (Tr. p. 97, lines 17-20).

Red then testified that when asked about what was going on, D-Shop said, "Man, he in there beating, beating that man, ..." (Tr. p. 98, lines 1-3). Red testified, "... and I was like that's F'ed up, go stop him, and he say he did try, but they kicked him out." (Tr. p. 98, lines 3-5). The judge erred in allowing the hearsay testimony.

Todd Wise testified that he was at Art Riley's house with Red on the evening of November 2, 2010, and early morning of November 3, 2010. (Tr. p. 111, line 21 – p. 112, lines 1-21). Wise testified that they were asked to leave Riley's house shortly after Niki

arrived because Niki and Riley had a date. (Tr. p. 113, lines 2-14). Wise testified that after he and Red left Riley's house they saw Appellant and D-Shop coming up the sidewalk toward Riley's house. (Tr. p. 113, line 15 – p. 114, 115, lines 1-3). According to Wise, as he and Red were headed down the dirt road an argument ensued between Appellant, D-Shop and Riley. (Tr. p. 115, lines 6-24). Wise and Red continued down the dirt road hoping to buy alcohol but when nobody answered the door at the presumed liquor house, they walked back up the dirt road and saw D-Shop. (Tr. p. 116, line 2 – p. 117, lines 1-2). Wise testified that D-Shop said, "New York is beating Art or trying to kill him at some point." (Tr. p. 117, lines 2-3). The trial judge stated, "I'm noting your objection for the record again --" (Tr. p. 117, lines 4-5).

D-Shop testified that earlier in the evening of November 2, 2010, he and Appellant were at Shorty's Club. (Tr. p. 66, line 9 – p. 67, lines 1-14). The two left the Club between 2:00 and 2:30 AM and got a ride from somebody who dropped them off near Riley's house. (Tr. p. 67, lines 4-25). D-Shop testified that he went to Riley's house to see if "he had any girls or something there." (Tr. p. 68, lines 19-23). According to D-Shop, Riley allowed him in the house but not Appellant. (Tr. p. 69, lines 7-11). D-Shop testified that after he determined there were no girls at Riley's house, he was on his way out but Riley and Appellant were arguing about why Appellant could not come inside. (Tr. p. 69, lines 12-23). The argument escalated into a shoving match and D-shop testified that he was unsuccessful in breaking up the argument so he left. (Tr. p. 69, line 24 – p. 70, lines 1-25).

D-Shop testified that after he left Riley's he saw Red about 30-40 yards away and then later saw Todd. (Tr. p. 70, line 22 – p. 71, 72, lines 1-7). Appellant and Riley were still arguing on the porch. (Tr. p. 72, lines 8-15). Todd told D-Shop to go and get

Appellant. (Tr. p. 72, lines 19-20). According to D-Shop he once again tried to break up the fight but was again unsuccessful. (Tr. p. 72, line 20 – p. 73, 74, lines 1-6). D-Shop then walked off and went home, according to his testimony. (Tr. p. 74, lines 11-14). D-Shop testified that he never saw a knife or any weapon. (Tr. p. 74, line 7). D-Shop later gave a statement to police indicating that Appellant was beating Riley to "deaf" meaning that he was beating the hell out of him. (Tr. p. 82, lines 1-14).

The trial judge erred in overruling the hearsay objections made to the testimony of Red and Todd Wise about what a D-Shop said, when the testimony fails to meet the present sense impression exception to the rule against hearsay. In State v. Parvin, 2012-205888, 2014 WL 3734369 (S.C. Ct. App. July 30, 2014), the South Carolina Court of Appeals wrote:

> "Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996). "Hearsay is inadmissible as evidence unless an exception applies." Id. Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Our courts have not delineated a time frame that would constitute "immediately thereafter"; however, this court has held that a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1), SCRE. State v. Burroughs, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct.App.1997).

The State, as the proponent of the testimony, failed to establish that the time frame constituted "immediately thereafter" for purposes of meeting the present sense impression to the rule against hearsay. "The burden of establishing the facts which qualify a statement as an excited utterance [or present sense impression] rests with the proponent of the evidence." 31A C.J.S.*Evidence* § 359 (1996); accord Mariano v. State, 933 So.2d 111,

118 (Fla.Dist.Ct.App.2006); Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky.1998); State v. Kemp, 919 S.W.2d 278, 280 (Mo.Ct.App.1996) ("The party offering the statement as an exception to the rule against hearsay has the burden of making a sufficient showing of spontaneity to render the statement admissible."). State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006).

In regard to Wise's testimony that D-Shop stated Appellant was trying to kill Riley, the State failed to establish that the time frame constituted "immediately thereafter" as well as failed to establish that D-Shop witnessed any actions that would have constituted voluntary manslaughter. Riley died from stab wounds and D-Shop only testified to witnessing a fist fight, with no weapons, between Appellant and Riley. Statements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance [or present sense impression] exception to the hearsay rule. State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998); State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006). Based on the totality of the circumstances and the record in the present case, D-Shop could not have witnessed the manslaughter of Riley when he all he saw was a fist fight and Riley died of stab wounds. The erroneous admission of the hearsay testimony was not harmless.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2014.

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APPELLATE CASE NO. 2012-212140

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Deshawn Lee Powell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Edgar W. Dickson, which was held on May 17, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Deshawn Lee Powell.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2014.

STATE OF SOUTH CAROLINA

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Edgar W. Dickson, Circuit Court Judge

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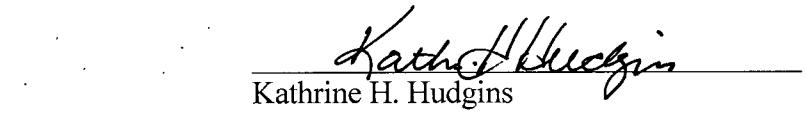
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment and sentencing sheet;
(2) Trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 14th, 2014



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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 14, 2014

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APPELLATE CASE NO. 2012-212140

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Deshawn Lee Powell, #350880 at Lieber Correctional Institution, this 14th day of August, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.